STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2003
v	No. 242197 Wayne Circuit Court
TERRELL ECHOLS, Defendant-Appellant.	LC No. 01-000442-01

Before: Whitbeck, C.J., and Jansen and Markey, JJ

PER CURIAM.

Defendant was convicted in a bench trial of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv). Defendant was sentenced to one year in jail and lifetime probation. He appeals as of right. We affirm.

Defendant testified that on December 4, 2001, he left work at 11:30 a.m. and returned home to 5710 Stanton to take his son to school, as was his daily routine. At 11:55 a.m., Detroit Police Officer Darren Johnson was undercover, conducting a pre-raid surveillance of 5742 Stanton in Detroit. From Johnson's position he noticed two men selling drugs down the street, one of the men being defendant. Johnson observed defendant, on four occasions, approach a vehicle in the middle of the street, wave the vehicle on (the vehicles drove around the block), go into a field adjacent to the north side of his residence, take foil packets from a clear plastic baggie in the grass, and exchange the foil packets for money with the occupant of the vehicle upon its return.

In order to preserve his cover, Johnson radioed the raid team to make an arrest. Detroit Police Officer Derrick Carter arrived on the scene and arrested two men, including defendant. Upon Johnson's direction, Carter went to the grassy area on the north side of 5710 Stanton and retrieved the plastic baggie. The parties stipulated that the chemist's analysis showed the substance in the foil packets to be heroin. At police headquarters, Detroit Police Officer Ricky Brown found $132, but no drugs, on defendant. During this time, none of the vehicles involved in the transactions were pulled over.

Defendant testified that he was outside his home on December 4, 2000. Defendant also testified that he saw a neighbor, Tyrena Henry, outside and took some mail out to her. According to defendant, as he was walking back to his home, he was arrested. Defendant further testified that he had not dealt drugs nor waved down any vehicles that day, and Henry testified

that she did not see defendant engage in the described transactions. At trial, defendant's co-worker, Derrick McGhee, testified that defendant did leave work every day at 11:30 a.m. for forty-five minutes to take his son to school, and a letter from the son's school was introduced to corroborate the testimony presented.

Defendant's first issue on appeal is that his conviction was against the great weight of the evidence. We disagree.

Generally, on a claim that a verdict is against the great weight of the evidence the defendant must show that "the evidence preponderates heavily against the verdict." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). A verdict may only be disturbed if the credible evidence in the defendant's favor outweighs the evidence against him. *Id.* It is the duty of the trier of fact to make determinations regarding credibility. *Id.* at 643-645. As to a bench trial, our review is of the findings of fact for clear error. MCR 2.613 (C); see also *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Gistover, supra* at 46; citing *People v Stoughton*, 185 Mich App 219, 227; 460 NW2d 591 (1990).

We find that the trial court's findings were not clearly erroneous because the evidence in defendant's favor does not outweigh the evidence against him. Defendant presented testimony that he had returned home from work to take his son to school and that was his daily routine. Defendant also testified that he had gone down the street to return mail to a neighbor and had not engaged in drug activities on that day. There were no witnesses to identify defendant as the seller as none of the vehicles had been stopped. However, defendant's witnesses could not account for his whereabouts the entire time he was on Stanton Street. Johnson observed defendant greeting cars, waving them on, taking foil packets from a plastic baggie and exchanging them for money with the occupants of the vehicles. In light of the observations made by Johnson, trial judge's findings were not clearly erroneous and defendant's conviction was not against the great weight of the evidence. See *Lemmon*, *supra* at 642-645.

Defendant's last issue is that his conviction was based on insufficient evidence. We disagree. This Court reviews this issue de novo and in the light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

The elements of possession with intent to deliver are: 1) knowing possession of a controlled substance; 2) intent to deliver; 3) substance actually identified as, and defendant knew it to be, a controlled substance; and 4) the weight. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Johnson observed defendant exerting control over the contents of the baggie by taking it from the grass and removing foil packets. Johnson also observed defendant greeting cars, waving them on and returning to exchange foil packets for money. The plastic baggie containing foil packets of heroin was found in the grassy area where Johnson observed defendant. The parties stipulated that the content was in fact heroin. Money was found on defendant by Brown at police headquarters. The fact that no drugs were on defendant is not critical since he was keeping them in the field so they were not on his person. From this evidence, the trial judge could find that the elements of possession with intent to deliver less than fifty grams of heroin had been proven beyond a reasonable doubt.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey